82-1112

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LEONARD P. KLINE,

Petitioner,

v.

CITY OF FAIRFAX, VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

May the City of Fairfax, Virginia, compatibly with the Fifth and Fourteenth Amendments' proscription against deprivation of property without due process of law, impose an ordinance which retroactively divests Chief Kline, the Petitioner, of his right at retirement to be paid for his vested and unused accumulated leave?

PARTIES TO THE PROCEEDINGS

1. Leonard P. Kline, former Chief of Police for the City of Fairfax, Virginia and the Plaintiff-Appellant below is the Petitioner herein.

2. The City of Fairfax, a municipal corporation organized under the laws of the Commonwealth of Virginia, was the Defendant-Appellee below and is the Respondent herein.

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CITY OF FAIRFAX, VIRGINIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Leonard P. Kline, former Chief of Police for the City of Fairfax, Virginia, petitions for a writ of certiorari to review the Judgment of the Supreme Court of Virginia in this case.

OPINIONS AND JUDGMENTS BELOW

The Order of the Supreme Court of Virginia denying the petition for writ of error was entered on October 8, 1982, and appears at page 1a of the Appendix to this Petition.

The Final Judgment Order of the Circuit Court of Fairfax County, Virginia, was entered on October 16, 1981, and appears at page 2a of the Appendix.

The findings and rulings of the Circuit Court of Fairfax County, Virginia, were set forth in a letter opinion dated July 21, 1981, and the opinion appears at page 4a of the Appendix to this Petition.

JURISDICTION

The Order of the Supreme Court of Virginia denying review of the dismissal of Plaintiff's Motion for Judgment was entered October 8, 1982 (App. A). A timely Petition for Writ of Certiorari to the Supreme Court of Virginia is hereby submitted to this Court and jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND ORDINANCE PROVISIONS

The Fifth and Fourteenth Amendments of the United States Constitution are set out in the Appendix at 7a.

Ordinance No. 1974-4 providing for a system of personnel administration for employees in the career service of the City of Fairfax, Virginia was adopted by the City Council of the City of Fairfax, Virginia on May 21, 1974 and became effective on July 1, 1974. It is set out at page 8a of the Appendix.

Ordinance No. 1975-27 amending the system of personnel administration was adopted on June 17, 1975 by the City Council of the City of Fairfax and is included at page 27a of the Appendix.

Ordinance No. 1975-52 amending the system of personnel administration was passed by the City Council

on October 20, 1975. It is set out at page 29a of the Appendix to this Petition.

STATEMENT OF THE CASE

This Petition arises from the dismissal of Leonard Kline's Motion for Judgment against the City of Fairfax, Virginia.

Leonard P. Kline was employed as a police officer by the City of Fairfax from August 15, 1953 until June 30, 1977. When Mr. Kline retired in 1977, after almost twenty-four years of service, he was Chief of Police for the City of Fairfax and he had accrued a substantial amount of earned, but unused, "leave". If Chief Kline had retired prior to October 20, 1975, after twenty-two years of faithful service, instead of working almost two more years, he would have retired with a lump sum payment for his unused leave just as many Fairfax City employees did before October, 1975. Chief Kline, however, relied on the fact that "leave" he had earned, but not used due to job dedication and fortunate good health, would be honored and compensated when he finally retired. For this reason, and others, Chief Kline did not retire after twenty-two years—he gave the City of Fairfax nearly two years of additional service only to find that the compensation he relied on and expected in payment of his unused leave would not be honored.

Chief Kline alleged that his reliance on and expectation of compensation for his earned leave was retroactively undermined by the City of Fairfax and amounted to a deprivation of property without due process of law. The Circuit Court of Fairfax County, Virginia by letter opinion dated July 21, 1981 and by final judgment entered October 16, 1981 dismissed Chief Kline's claim.

The Supreme Court of Virginia refused Chief Kline's petition for appeal on October 8, 1982.

FACTUAL BACKGROUND

Prior to July 1, 1974, employees of the City of Fairfax accumulated "annual" and "sick" leave pursuant to an established employee benefit plan of the City, as follows:

> An Employee could accumulate, at a prescribed rate according to days worked, a maximum of thirty days annual leave and an unlimited amount of unused sick leave.
>
> Annual leave in excess of thirty days was converted to sick leave.
>
> In addition to the permissible use of these categories of leave during the term of employment, upon separation from employment, an employee received money payment for accumulated annual leave up to the thirty day maximum.
>
> Also upon separation, unused sick leave would count toward the thirty day maximum annual leave to be paid on the basis of one day annual leave for each three days accumulated sick leave.

In late 1973 and through the first half of 1974, the City of Fairfax wanted to improve its personnel program in several respects. City management was aware of some employee unrest and was very concerned about attempts to organize and unionize the Police Department. (McNayr Tr. 36-38, Fleck Tr. 10-13.) There was also concern about excessive use and abuse of sick leave by certain employees. Moreover, a formal personnel policy was required to be adopted by cities pursuant to state law. Code of Virginia 1950 as Amended § 15.1-7.1. In

order to conform to statute, for the other specified reasons, and to improve employee morale and productivity, the City Manager, Irving McNayr, hired Mr. Jack Foster, retired Personnel Director of Artlington County, Virginia, as a consultant "to come up with a program which would be acceptable to all of the personnel and, of course, to the City Council." (McNayr Tr. 36-39, 41-43, 45-57, Fleck Tr. 10-11, Foster Tr. 4-7, 14-15, 21-23; see also reasons set forth in Exhibits 10-A and 10-B.)

Mr. Foster knew that the City had long experience with certain employees using sick leave as fast as they earned it (Foster Tr. 32), and so he proposed a modification of the system of accumulation, use, and payment for leave along the lines of programs in private industry. This proposal was a part of revamping the entire personnel system. The change was discussed with all employees, on both an individual and group basis. All had an opportunity to participate in the discussions, and suggested changes were considered. When employees objected to the fact that 2 hours less sick leave per pay period and 4 hours "bonus" per year were lost under the new ordinance, the employees were told by management that they had to "give up something to get something," *i.e.*, the number of hours accumulated would be reduced in return for the benefit of being paid for unused accumulated hours. (Kline Tr. 131, Fleck Tr. 7-8, Foster Tr. 7-8, McNayr Tr. 44-45, 57-58.)

Drafts of a proposed ordinance went to all employees and to the City Council. When everyone finally concurred the result was the 1974 ordinance which for the first time established a formal personnel policy and pay plan for the City. (Foster Tr. 23-24.) By City ordinance effective July 1, 1974 (App. p. 8a) the old employee

benefit plan was changed as follows: The categories of "annual" and "sick" leave were eliminated and a single category of "leave" was created. All earned, but unused leave ("annual" and "sick") was combined into a new total of "leave" (for example, thirty days "annual" and thirty days "sick" leave became sixty days "leave"). Upon separation, "leave" above thirty days was to be paid on the basis of one day for each two days accumulated. No limit was established on the total number of unused "leave" days which would be paid upon separation from employment, except that ten days accumulated "leave" had to be taken each year or it was lost to the employee.

In addition to improved employee morale, benefits of the new plan to the City were: the elimination of the 4 bonus hours of leave previously granted at the end of each year, and two hours per pay period of sick leave. Thereafter, the employees didn't take sick leave as often as they formerly took it. Also, financial cost was considered by the drafters of the original ordinance. The cost of the program to the City would likely be less because (1) fewer actual hours of leave would be accumulated; (2) more efficiency would be obtained from employees with higher morale who did not use sick leave for flimsy reasons; (3) under the old system there was a tendency of employees to use up sick leave before retirement so that the leave was not "lost"; *i.e.*, no difference if an employee was paid for not working because he was "sick" or because he was entitled to payment for unused leave at retirement.[1] (Foster Tr.

---

[1] Actually, under the old system, an employee who used up sick leave would be paid day for day, but he was not paid on a one for one basis for unused leave under the new system.

8-9, 11-13, 18-19, 24-25, Kline Tr. 137-138, Fleck Tr. 12-15, McNayr Tr. 43-44.)

In the spring of 1975, the City started preparing to sell bonds to upgrade its sewer system. Auditors for the City and a financial consultant from New York told the City that it had to include the value of its leave program in its financial statement. In order to reduce the City's "debt," new City Manager George Hubler decided to ask the City Council to rescind the leave portion of the 1974 ordinance, and thereby wipe out approximately $150,000.00 of obligations. Mr. Hubler admitted, however, that there were options to improve the financial statement other than retroactively taking away the right of employees to be paid for unused leave at retirement. He also admitted that the City was in no great financial crisis because of its leave program. (Hubler Tr. 174-179, 185-186, 189-191, 193-196.)

On July 17, 1975, the 1974 ordinance was amended, prospectively only, by the City Council of the City, as follows: a limit of payment for forty-five days "leave" was to be paid upon separation, for all "leave" accrued *subsequent* to June 17, 1975. "Leave" in excess of thirty days was to be paid on a ratio of one day for each two days accrued.

On October 20, 1975, the City Council of the City again amended the ordinance by reconstituting the "leave" for the period prior to July 1, 1974, into "annual" and "sick" leave designations. All leave over thirty days was now to be paid on a ratio of one day for each two days accrued. The ordinance stated that, "No payment will be made for sick leave accrued upon separation or retirement from City service." The Council made these provisions *retroactive.*

As a result of the actions taken by the City on October 20, 1975, Leonard Kline lost the right to be paid for his unused leave at the time of his separation from employment (in his case by retirement) from the City. Prior to October 20, 1975, Chief Kline could have retired and received a lump sum payment (certain former employees of the City did just that); after the council meeting of October 20, 1975, such payment could not be obtained. (Kline Tr. 123-124.) It is on the basis of a retroactive taking of vested rights that the Petitioner brought his action for deprivation of property without due process of law.

FEDERAL QUESTION RAISED

Petitioner seeks review of issues involving the Fifth and Fourteenth Amendments of the Constitution of the United States which were timely raised below and decided adversely to the Petitioner. The Federal Constitutional provisions protect against the deprivation of property without due process of law yet the City of Fairfax, Virginia, in violation of these amendments, passed an ordinance that retroactively divested Chief Kline of his right to compensation for earned but unused leave accumulated prior to October 20, 1975. This Court is presented with an opportunity to consider and clarify the important question of whether leave benefits of a public employee, earned during the period of employment, are vested property rights within the meaning of the Fifth and Fourteenth Amendments such that they will be protected against retroactive deprivation by state action.

REASONS FOR GRANTING THE WRIT

I.

WHERE A STATUTE OR CONTRACT PROVIDES THAT A PUBLIC EMPLOYEE MAY ACCUMULATE LEAVE WITH CASH ON TERMINATION, THE BENEFIT IS VESTED AS SOON AS LEAVE IS ACCUMULATED AND IT BECOMES A FIXED INTEREST WHICH AS A MATTER OF CONSTITUTIONAL DUE PROCESS SHOULD BE PROTECTED AGAINST RETROACTIVE STATE ACTION.

1. Ordinance Provisions.

This case presents the spectacle of a Virginia municipality granting by ordinance certain compensation and leave benefits to its employees only to retroactively divest said employees of accumulated benefits when the City later had a need to improve the appearance of its financial statement.

In late 1973 and early 1974 the City of Fairfax was concerned about employee unrest and the possibility of Teamster organization of the Police Department. In addition, the City was under statutory mandate to formulate official personnel policies. Code of Virginia 1950 as amended § 15.1-7.1. To conform to state law, and in order to improve employee relations, the City adopted Ordinance 1974-4 on May 21, 1974 which provided that, "After successful completion of the probationary period, the employee [would be] entitled to the full benefits of a Career Service employee as provided by [the] ordinance." One such benefit was agreed to as follows:

> Upon separation or retirement an employee shall be paid in full for all accrued leave up to a maximum of 30 work days (240 hours). Leave in excess of

> 30 days shall be paid on a ratio of one day for each two days accrued.

In late spring of 1975, barely one year after the formulation of the City's system of personnel administration, a *prospective* amendment of Ordinance 1974-4 was passed by the City Council. City of Fairfax, Virginia, Ordinance 1975-27. The newly formalized leave benefits were trimmed as far as *future* compensation of accumulated leave was concerned. Since this action was prospective in nature, Petitioner has no due process argument with the validity of the Ordinance. The new benefit provision read as follows:

> Upon separation or retirement an employee shall be paid in full for all accrued leave up to a maximum of 30 work days (240 hours). Leave in excess of 30 days shall be paid on a ratio of one day for each two days accrued, *not to exceed payment for 15 additional days (120 hours). This 45-day limit shall apply for leave accrued from the date of the adoption of this ordinance.*

(Emphasis added.)

Within three months the City Council once again amended Ordinance 1974-4 by reconstituting leave accumulated prior to July 1, 1974 into "annual" and "sick" leave. City of Fairfax, Virginia Ordinance 1975-52. Leave accrued after July 1, 1974 and up to the adoption of the amendment was to be treated as "annual" leave. After the date of the amendment, "sick" leave would accrue for full-time employees at the rate of four hours for each two week pay period. Upon separation or retirement the new amendment allowed payment for "annual" leave accumulated as follows:

> Up to a maximum of 30 days accrued annual leave shall be paid on the basis of one day for each day

> of annual leave accrued. Accrued annual leave in excess of 30 days shall be paid on a ratio of one day for each two days accrued.

"Sick" leave was dealt with summarily:

> No payment will be made for sick leave accrued upon separation or retirement from City Service.

This new amendment, of course, had the effect of *retroactively* divesting long term employees of all leave accumulated prior to July 1, 1974 that was "reconstituted" into "sick" leave. In Chief Kline's case his leave balance was reconstituted into 1,587 hours "sick" leave and 355 hours "annual" leave. Thus, the value of his retroactively divested "sick" leave was $12,763.42. (Trial Exhibit 38.)

2. Vested Benefit Rights.

It has been stated that the Federal Constitution's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property rights—can take many forms. *See, Board of Regents v. Roth,* 408 U.S. 564 (1972). As elaborated in *Roth*:

> To have a property interest in a benefit a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be artibrarily undermined.
>
> * * *
>
> Property rights, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or under-

> standings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. 564, 577.

"Leave" is a claim upon which employees rely in their daily lives and they have more than an abstract need for such benefits. An employee typically plans his vacation, determines the wisdom of taking sick days and even considers his retirement based on his reliance on earned leave being honored. It is with this in mind that courts have stated that leave benefits are part of an employee's overall compensation earned during the period of employment. *See, Vangilder v. City of Jackson,* 492 S.W.2d 15 (Mo. App. 1973). Moreover, it has been held (in keeping with the *Roth* Court's view that property rights are created and defined by existing rules such as state laws), that where a statute provides that employees may accumulate leave with cash payment on termination, the leave benefit is *not contingent,* but is vested as soon as the leave is accumulated. *Christian v. County of Ontario,* 399 N.Y.S. 2d 379 (1977); *Harryman v. Roseburg Rural Fire Protection District,* 244 Ore. 631, 420 P.2d 51 (1966).

Chief Kline has been deprived of a vested property interest created by City ordinance—a specific benefit was earned by Chief Kline and he relied on it being honored, not retroactively rescinded.

II.

THIS CASE PRESENTS ISSUES OF CENERAL IMPORTANCE DIRECTED TO THE RELATIONSHIP BETWEEN TERMS OF PUBLIC EMPLOYMENT AND DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION—ISSUES WHICH MERIT THE CONSIDERATION OF THIS COURT.

In *State of Mississippi v. Miller,* 276 U.S. 1974 (1928), a statute which retroactively reduced the amount of compensation that a revenue agent was to receive was reviewed by this Court. In invalidating the statute, the Court stated as follows:

> It is well understood that the contract clause does not limit the power of a state during the terms of officers to pass and give effect to laws prescribing for the future the duties to be performed by, or the salaries or other compensation to be paid to, them. *Butler v. Pennsylvania,* 10 How. 402, 13 L. Ed. 472. But, after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection extends to such contracts just as it does to those specifically expressed. The selection of plaintiff to be the revenue agent amounted to a request or direction by the state that he exert the authority and discharge all the duties of that office. In the performance of services so required of him plaintiff made the investigations and brought the suits to discover and collect the delinquent taxes. Under the statutes then in force as construed by the highest court of the state, he thereupon became entitled to the specified percentages of the amounts subsequently collected on account of the taxes sued for. The retroactive application of Chapter 170 would take from him a part of the amount that he had theretofore

> earned. That would impair the obligation of the implied contract under which he became entitled to the commissions. This case is ruled by *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 6 S. Ct. 329, 29 L. Ed. 587.

This Court has thus recognized that although it may be correct that public employees have no contractual or vested right to the public office itself, it does not necessarily follow that contractual or vested rights in benefits of the office cannot accrue. This fact was also recognized in *Bennett ex rel. Arizona State Personnel Commission v. Beard*, 27 Ariz. App. 534, 556 P.2d 1137 (1976). In *Beard*, an employee of the Arizona Highway Department brought suit to invalidate an action by the Arizona State Personnel Commission. The Commission had instituted a new policy under which annual leave would accrue at the rate of only ten hours per month as compared to the prior rate of twelve hours per month. This change resulted in the plaintiff being entitled to only fifteen days annual leave instead of the eighteen days he had previously enjoyed. Unlike the action taken in the case at bar, however, this change was not made retroactive. Since the change was prospective only, the court held that the plaintiff had no contractual right to continue his past leave benefits into future employment. The Commission's prospective change could be invalidated only if it was in violation of a formal written contract or a statute prohibiting such a change.

The Court in *Beard* made it clear that if the change had been made retroactive, it would have been invalidated. In reaching this conclusion, the court agreed that public employees have no contractual or property right to continued employment. However, according to the court, that principle of law should not prevent a court

from invalidating any retroactive impairment of rights which have already vested. The court stated:

> The state, having the right to take the most drastic step involved with appellee's "contract of employment"—termination—without liability, may the state without liability take the less drastic step of changing the terms of appellee's future employment by way of compensation, that is, benefits? The answer is obviously yes, *provided* that the change does not impair rights vested by reason of the prior employment. *Yeazell v. Copins*, [98 Ariz. 109, 402 P.2d 541 (1965)]. Under this analysis, the commission could not, say in July, 1969, pass a rule that provided that retroactive to January 1, 1969, appellee's leave benefits would be computed at a rate less than was previously in effect from January 1, 1969 to July, 1969. Such a result is prohibited by *Yeazell* as affecting benefits vested by reason of appellee's compliance with the conditions precedent to earning those benefits—his continued employment during that period.

556 P.2d at 1140 (Court's emphasis).

Accordingly, the key to determining whether rights have vested is whether all of the conditions precedent to the earning of the benefits have been satisfied. In *Beard*, there was only one condition with which it was necessary for the employer to comply in order for his rights to vest—his continued employment during the period when the prior law was in effect. Since he had satisfied that condition, he had acquired vested rights of which he could not be retroactively deprived by the government. Based on such reasoning, the Petitioner, Chief Kline, had a vested right in payment of accrued leave according to the terms of the prior ordinance. Like the plaintiff in *Beard*, Chief Kline was required to comply with only

one condition subsequent in order for his rights to vest—continued employment during the period when the prior law was in effect. Having complied with that requirement, Leonard Kline acquired a vested right of which the municipality could not lawfully deprive him.

In a similar case, a Michigan court held that the plaintiffs, inspectors employed by the Public Service Commission, by continuing their employment through the duration of the period for which the law in question was in effect, had acquired a vested right in the benefits provided for in that law. *Ramey v. State,* 296 Mich. 449, 296 N.W. 323 (1941). The law provided that employees in the classified civil service were to be given vacations with pay and that any such employee who was separated from employment without having taken his vacation was to be compensated for that unused benefit. Later, the plaintiffs' positions were removed from the classified civil service, on the basis of which the state argued that they were not entitled to reimbursement for unused vacation time. The court held that since the employees had acquired vested rights to the benefits, it was unlawful for the state to have deprived them of the benefits. The court stated as follows:

> "Under the facts in this case, plaintiffs had performed all acts necessary to insure to themselves the right of a vacation with pay, or if dismissed before exercised, to receive compensation for the unused portion of their annual leave allowances. There was nothing remaining for them to do except exercise the right which depended on no contingency, but was complete and matured. In my opinion, vacation with pay is not a gratuity; it is compensation for services rendered. It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an

> implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation." *Fisk v. Jefferson Police Jury,* 116 U.S. 131, 6 S. Ct. 329, 29 L. Ed. 587; *Robertson v. Miller,* 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517.

296 N.W. at 325.

According to the court in *Ramey,* not only did the plaintiffs have a vested right to the benefits, they also had an implied contract which could not be impaired by subsequent legislation. This interpretation is consistent with this Court's view in *State of Mississippi v. Miller,* 276 U.S. 1974 (1928).

State courts in numerous other cases have held that vested rights to employment benefits cannot be taken away from a public employee. *See Clift v. City of Syracuse,* 45 App. Div. 2d 596, 360 N.Y.S.2d 356 (1974) (the court held that an employee who had been discharged before he could use his accumulated sick leave was deprived of property without due process, since vacations are conditions of employment, not gratuities); *Vangilder v. City of Jackson,* 492 S.W.2d 15 (Mo. App. 1973) (sick leave benefits were held to be part of an employee's overall compensation, earned during the period of his employment and forming a part of his employment contract); *Harryman v. Roseburg Rural Fire Protection District,* 244 Ore. 631, 420 P.2d 51 (1966) (the court rejected the argument that sick leave was mere gratuity for city employees and held that since the plaintiff had accepted employment on the assumption that sick leave was part of his compensation for services, it was a contractual term of employment); *City of Orange v. Chance,* 325 S.W.2d 838 (Tex. Civ. App. 1959) (payment for unused sick leave was not merely a

gratuity, but rather was part of the employee's overall compensation).

For the reasons discussed above, the divesting of Chief Kline's right to be paid for his unused leave was a taking of property without due process of law. The City's action is comparable to giving an employee a bonus contingent on his continued work for a specified period. After the period passes and the bonus vests, the bonus is abolished without notice or a hearing. Whether a municipality may pass an ordinance such as the one involved here and abolish vested property rights without notice is an issue worthy of review by this Court.

CONCLUSION

This Court should take this case for its full review. From the above, one of the last analogous decisions of this Court on the subject of divesting public employee entitlements is *State of Mississippi v. Miller,* 226 U.S. 1974 (1928). Today, public employees are increasingly compensated by what are often termed "fringe benefits" in addition to salary. No doubt, benefits such as the right of Chief Kline to be paid for his unused leave in accordance with a local law should not be thought of as on the "fringe" of his total compensation package; rather the entitlement to be paid on retirement is an elemental part of that package which constituted his remuneration for faithful public service. *See, e.g., Christian v. County of Ontario,* 399 N.Y.S.2d 379 (1977). Elemental fair dealing is at odds with the City of Fairfax in this case, and elemental fairness is at the heart of the due process clause. The tangible rewards of public service are too few to permit further discouragement to those who consider careers as servants of us all. The millions of public servants, both state and federal,

look to this Court to condemn arbitrary action, including the divesting of accrued entitlements. This case is important to these millions, and is worthy of this Court's full attention and decision. The issue is simple, the facts are uncomplicated, the import is far reaching, the need for the highest precedence is clear. This petition should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of October, 1982.

Record No. 820089
Circuit Court No. L-41668

Leonard P. Kline,
Appellant,

v.

City of Fairfax,
Appellee.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

/s/ Deputy Clerk

APPENDIX B

VIRGINIA
CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 41668

Leonard P. Kline,
Plaintiff,

v.

City of Fairfax,
Defendant.

FINAL JUDGMENT ORDER

THIS MATTER having been submitted to the Court for decision,

AND the Court having considered the evidence presented and the arguments of counsel,

AND the Court having set forth its findings and rulings in its letter opinion dated July 21, 1981, a copy of which is attached hereto as Exhibit A and incorporated herein by reference, it is hereby

ORDERED that the Plaintiff's Motion for Judgment is hereby dismissed and final judgment is hereby entered in favor of the Defendant, City of Fairfax, and it is further directed and

ORDERED pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia that the following transcripts are part of the record; the transcript of the October 15, 1979 deposition of Leonard P. Kline, the transcript of

the December 17, 1979 deposition of George E. Hubler, Jr., the transcript of the July 7, 1980 deposition of Robert L. Fleck, the transcript of July 8, 1980 depositions of Jack H. Foster, Irving Galbert McNayr, and Augustus Howell Thomas, Jr., and the transcript of the January 14, 1980 hearing of this matter.

AND THIS ORDER IS FINAL.

ENTERED this 16th day of October, 1981.

/s/ Lewis Hall Griffith, Judge

Presented by:

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By /s/ Wyatt B. Durrette, Jr.
Counsel for Defendant

Seen and Objected to:

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By /s/ Gilbert K. Davis, Esq.
Counsel for Plaintiff

APPENDIX C

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
COUNTY OF FAIRFAX CITY OF FAIRFAX
CITY OF FALLS CHURCH
Fairfax County Courthouse
4000 Chain Bridge Road
Fairfax, Virginia 22030

July 21, 1981

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Re: *Kline v. City of Fairfax*
Law No. 41668

Gentlemen:

This case was submitted for decision following oral argument and the submission of memoranda of counsel. I have reviewed the pleadings, stipulations, depositions and memoranda provided. Based upon the evidence presented and upon the law as I understand it the plaintiff's claim must be dismissed.

Two concepts control the decision in this case.

First, it is clear that the nature of the plaintiff's employment with the City is "inconsistent with either a property or contract right". *Johnson v. Black*, 103 Va. 477, 489 (1905); *Loving v. Auditor*, 76 Va. 942 (1882);

Holladay v. Auditor, 77 Va. 425 (1883); *Frazier v. Virginia Military Institute*, 81 Va. 59 (1885); *Sinclair v. Young*, 100 Va. 284 (1902); *Taylor v. Beckham*, 178 U.S. 548 (1900).

Second, "sick leave", by its very nature, is not an emolument of employment of the same type as salary or annual leave. "Sick leave" is more akin to a term life insurance policy. During the term of such a policy, if one dies, he, or more accurately his beneficiaries, are able to reap the benefits of the policy. Should the insured party survive beyond the term of the policy no benefit is obtained and the premiums paid during the term are lost. Likewise, in the instant case the plaintiff was "insured" against a loss of wages due to illness or injury throughout his term of employment. It having been the plaintiff's good fortune to have little or no incapacitating illness or injury during the course of his employment, he has, within the framework of the analogy, survived the term.

The fact that the City had, at one time, chosen to pay employees for unused sick leave and now chooses not to do so, is entirely the City's prerogative. It is quite clear that in a case such as this:

> The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may even be taken away without abolishing the office. . . . there are no constitutional limitations upon that power, and the legislature may exercise it without hinderance. [citations omitted]

Sinclair v. Young, 100 Va. 284, 291 (1902).

Accordingly, I find specifically that the plaintiff obtained no vested right to compensation for unused "sick leave", that he was not denied equal protection of law when certain City employees, who retired prior

to October 20, 1975, received large lump sum payments upon their retirement; and, that the City has not breached vested contractual rights of the plaintiff.

Mr. Durrette should prepare an appropriate Order and submit the same to opposing counsel for endorsement and approval as to form.

Very truly yours,

/s/ Lewis Hall Griffith

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

ORDINANCE NO. 1974-4

AN ORDINANCE AMENDING THE CODE OF THE CITY OF FAIRFAX, VIRGINIA TO ADD TO CHAPTER TWO OF THE CODE OF THE CITY OF FAIRFAX, VIRGINIA, A NEW ARTICLE VIII, PROVIDING FOR A SYSTEM OF PERSONNEL ADMINISTRATION FOR EMPLOYEES IN THE CAREER SERVICE OF THE CITY OF FAIRFAX, VIRGINIA.

BE IT ORDAINED by the City Council of the City of Fairfax, Virginia, that the Code of the City of Fairfax, Virginia, be and it hereby is amended by adding to Chapter 2 of the Code of the City of Fairfax, Virginia, a new Article VIII to read in its entirety as follows:

ARTICLE VIII. PERSONNEL ADMINISTRATION FOR EMPLOYEES IN THE CAREER SERVICE.

Sec. 2-38. Purpose.

The purpose of this ordinance is to provide for a system of personnel administration for the City of Fairfax, Virginia based on merit principles such as equitable compensation policies, open competition for appointment and advancement, and equal employment opportunities. Career Service employees shall be appointed, promoted, demoted, transferred, disciplined, rewarded and dismissed solely on the basis of merit and fitness, and without regard to age, race, color, sex, religion, national origin, or because of a physical handicap which will not interfere with the adequate performance of duties.

Sec. 2-39. Definitions.

Anniversary date. The date which is used in determining an employee's eligibility for periodic advances in pay and leave. The date of an employee's original appointment (or most recent appointment if there has been a break in service) shall be his anniversary date for determining leave. The anniversary date for in-grade advances shall be the date of an employee's most recent pay increase except when such increase was the result of an overall revision of the Pay Plan.

Compensatory leave. This is leave earned for necessary work beyond the regular work day or regular work week for which no other compensation is authorized.

Overtime. Time worked by an employee in excess of eight hours a day or forty hours a week; work done on a holiday or other normal day off.

Pay grade. A level in the pay schedule with a common pay range for all classes assigned thereto.

Probationary period. The working test or trial period of employment beginning with the date of appointment.

Promotion. A change in status of an employee to a new position which has a higher salary grade.

Temporary employee. A person employed by the City with the specific understanding that the duration of employment will not exceed one year.

Upgrading is the assignment of a higher pay grade to a position or class of positions.

Sec. 2-40. The City Service.

The City Service shall be divided into an Exempt Service and a Career Service.

(a) The Exempt Service shall consist of the following:

(1) Members of the City Council and any staff assistants appointed directly by the Council.

(2) All other elected officials including Constitutional Officers and employees appointed by them.

(3) Members of boards and commissions.

(4) The City Manager, Superintendent of Schools, and City Clerk.

(5) The Registrar, Assistant Registrars and all election officials employed by the Electoral Board.

(6) All persons appointed on a contractual or fee basis.

(7) Temporary employees.

(8) All others that are exempted by Charter or ordinance.

(b) Employees in the Exempt Service are not subject to the provisions of this ordinance except as otherwise provided by law and as mutually agreed to by the appropriate appointing authorities and the City Council.

(c) Career Service. All positions, other than temporary, under the administrative direction and control of the City Manager are in the Career Service and subject to all provisions of this ordinance and supplementary regulations.

Sec. 2-41. Responsibility and Authority of the City Manager.

The City Manager shall have the responsibility and authority for administering the personnel system established by this ordinance. In implementing the ordinance, the City Manager is authorized to prepare administrative

regulations on personnel management not inconsistent with the ordinance.

Sec. 2-42. Appointing Authority.

(a) Appointing authority is the officer, board, commission, person, or group of persons having the power by virtue of State law, City Charter or ordinance to make appointments. The appointing authorities for the City are indicated below.

(b) The City Council shall appoint the City Manager, the City Clerk, the City Attorney, boards and commissions.

(c) The City Manager shall appoint department heads with the concurrence of the Council.

(d) The Commissioner of the Revenue shall appoint the Deputy Commissioner of the Revenue and other employees of that department.

(e) The Treasurer shall appoint the Assistant Treasurer and other employees of that department.

(f) The School Board shall appoint its employees.

(g) The Electoral Board shall appoint its employees.

(h) The City Manager or his delegee shall be the appointing authority for all persons in the Career Service and supporting seasonal, temporary or part time employees.

(i) The City Attorney shall appoint the prosecutor.

Sec. 2-43. Personnel Advisory Board.

(a) There is hereby created a Personnel Advisory Board, hereinafter referred to as the Board.

(b) Designation; term. The Board shall be composed of three persons designated by the City Council for three

year terms. Of the original appointments, one term shall expire on June 30, 1975; one on June 30, 1976; and one June 30, 1977; however, members shall remain in office until their successors are chosen. At the beginning of each fiscal year, the City Council shall designate one member to serve as Chairman of the Board. Members shall serve without compensation.

(c) Qualifications. The Board shall be composed of qualified voters of the City of Fairfax who are in full agreement with the application of merit principles in public employment as enunciated in Section 2.38 of this ordinance. Members shall not, while serving, become candidates for elected office.

(d) Responsibilities and duties. The Board shall:

(1) Represent the public interest in the improvement of personnel administration in the City service.

(2) Advise the City Council and the City Manager in the formulation of policies concerning personnel administration in the Career Service of the City.

(3) Hear employee appeals and grievances as provided in Section 2.48 of this ordinance.

(e) Executive Secretary. When the Board is serving in an advisory capacity, the City Manager or his designee shall serve as Executive Secretary to the Board and maintain minutes and other records of the Board. When hearing an employee appeal, the Board shall obtain a person to serve as secretary who is mutually agreeable to the appellant and the Board.

Sec. 2-44. Recruitment and Selection.

(a) Open competition. Positions in the Career Service shall be open to all persons who meet the minimum

requirements for the positions. The recruitment objective is to obtain well qualified candidates for City vacancies; however, in cases where residents and non-residents are equally qualified for particular positions, the residents shall receive priority consideration. Similarly, permanent employees shall be given preference over non-employees when equally qualified.

(b) Tests of fitness. Applicants may be required to take an examination to determine capacity or fitness for a position. Examinations may include written, oral, physical, or performance tests, or any combination thereof.

(c) Probationary period. All new Career Service employees are hired on a probationary basis for a period of one year. This is a working test period in which the new employee must show that he is capable and willing to perform his job satisfactorily. During this period the employee has no appeal rights as provided for in Section 2-48(e). After successful completion of the probationary period, the employee is entitled to the full benefits of a Career Service employee as provided by this ordinance.

Sec. 2-45. Position Classification Plan.

(a) All positions in the Career Service shall be grouped together into classes in accordance with the duties, responsibilities, and qualification requirements. At least once each fiscal year, the City Manager shall review the appropriateness of the classification plan after consultation with department heads and the Personnel Advisory Board.

(b) No person shall be employed in a position in the Career Service under any class title which has not been approved by the City Manager. No position shall be

filled other than on a temporary appointment of not more than six months by any person who does not meet the qualification requirements for that position as set forth in the class specifications which are a part of the position classification plan.

(c) All classes shall be assigned a numerical grade which shall be used to determine the pay level of the class in accordance with Section 2-46 of this ordinance. The actual duties performed and the level of education, skill, judgment, experience, knowledge and other qualifications required, are all considered in ranking and classifying Career Service positions.

Sec. 2-46. Employee Compensation.

(a) Pay plan. The City Manager shall make an annual review of the pay plan and the City Council shall adopt a pay plan simultaneous with the adoption of the annual Budget. The pay plan shall consist of two basic parts as follows:

(1) A schedule of pay grades showing a minimum and a maximum rate for each grade and such intermediate steps as are deemed necessary.

(2) A list of all class titles, showing the allocation of each class to an appropriate pay grade.

(b) Normal entrance salary. New appointments shall normally be made at the first step of the appropriate pay grade. However, appointments may be made above the minimum rate, subject to prior approval by the City Manager and the City Council.

(c) Within-grade advancement. Increases within each pay grade shall normally be made after one year in pay steps A through F; two years in Step G; and three years in Steps X and Y. These increases are not automatic or guaranteed; an employee's work must be satisfactory as

certified by his department head to be eligible for within-grade advancement.

(d) Effective date. Pay increases shall normally become effective at the beginning of the payroll period which includes the anniversary date of an employee's most recent pay increase, exclusive of general across-the-board adjustments.

(e) Promotions and Upgrading. A promotion shall be made in such a manner that the employee involved receives a salary increase equivalent to at least two steps in his prior salary range, provided, however, that the salary cannot go above the maximum or below the minimum for the specific grade. The City Manager may authorize an increase of more than two steps if necessary in order to attain internal pay equity. When a position is upgraded, the employee receives a pay increase of at least one step in his prior salary range. The new anniversary date for a promoted or upgraded employee is the date the action takes effect.

(f) Overtime. Employees in the Career Service who perform necessary overtime work shall be given compensatory leave (Section 2-47(d)) or overtime pay. Compensation for overtime work shall be at the rate of one and one-half times the regular rate for the position.

All overtime pay must be approved by the appropriate department head. It shall normally be limited to employees in pay grades 17 and below; exceptions to these categories must be approved in advance by the City Manager. Employees in pay grades above 17, except department heads, are entitled to compensatory leave for required overtime work as provided in Section 2-47(d).

When a holiday falls on the normal day off of an employee who works on a rotating shift, the employee shall be given an extra day's pay for that pay period.

(g) Premium pay. The normal pay for a position may be supplemented in certain cases because of unusual working conditions not common to all positions in the class or for educational attainment or special skills when determined by the City Manager to be in the best interest of the City with the approval of the City Council.

(h) Employee benefits. Other compensation may be provided to employees in the form of employee benefits as approved by the City Council. Such benefits shall include, but are not limited to, retirement, life insurance, and various forms of health insurance.

(i) Cash awards. Employee compensation may be supplemented by cash awards for outstanding performance. The basis for such awards may be any one or more of a variety of reasons, such as: continual work excellence above the call of duty; superior work in handling an event, incident, or special project; an act of heroism; the contribution of an idea that has resulted in savings to the City or improved operational efficiency. Nominations for awards may be submitted by any person, but they should be processed through department heads to the City Manager for recommended approval or disapproval of the nomination. The recommendations for awards shall become a permanent part of the employee's personnel file whether approved or disapproved. The awards shall become effective upon approval of the City Council.

Sec. 2-47. Holidays and Leave.

(a) Holidays. The following holidays shall be observed by the City and shall be granted to all employees without charge to leave:

New Year's Day	January 1
Lee-Jackson Day	3rd Monday in January

Washington's Birthday	3rd Monday in February
Memorial Day	Last Monday in May
Independence Day	July 4
Labor Day	1st Monday in September
Columbus Day	2nd Monday in October
Veteran's Day	4th Monday in October
Thanksgiving Day	4th Thursday in November
Christmas Eve	½ day on December 24
Christmas Day	December 25
Inauguration Day	January 20 (every 4th year)

The City Manager may substitute another day as a holiday in lieu of one of the days listed above.

Holidays falling on Saturdays or Sundays shall be taken on Fridays or Mondays respectively.

Compensatory leave or overtime pay shall be granted for work done on holidays as provided in Section 2-46(f) and 2-47(d).

(b) Leave with pay. The City grants leave with pay for vacations, illness, emergencies, or for any other purpose the employee desires at the following rates:

Employees with less than three years service, six hours leave per bi-weekly pay period.

Three to fifteen years service, eight hours per bi-weekly pay period.

Fifteen or more years service, ten hours per bi-weekly pay period.

Leave, except for illness or emergencies, must be approved in advance. The minimum leave increment is one hour. There is no limit on the amount of leave which may be accrued, except that each employee shall be required to use a minimum of 10 days (80 hours) each year.

Although leave is accumulated by this single category, an application for use of leave shall indicate whether the leave is for sickness, vacation or other purpose. Until a minimum reserve of 20 days (160 hours) has been accumulated, no more than 15 days a year may be used for a vaction.

Upon separation or retirement an employee shall be paid in full for all accrued leave up to a maximum of 30 work days (240 hours). Leave in excess of 30 days shall be paid on a ratio of one day for each two days accrued.

(c) Educational leave. An employee may be granted educational leave for the purpose of taking courses directly related to his work. Whether or not such leave will be granted, the duration of such leave, and whether such leave shall be with or without pay or with partial pay shall be at the discretion of the City Manager and shall involve considerations such as work load, availability of funds, appropriateness of courses, and other case-by-case considerations. In all cases where management directs employees to take education and training during regular working hours, the City will continue their salary, and assume all reasonable costs.

Normally, the granting of educational leave has the condition of return to work after a specified period of no more than a year and returning to the same position at the termination of leave; however, educational leave for a longer period may be granted with the condition that the City would not guarantee return to the same position but would offer the employee the first appropriate employment opportunity.

(d) Compensatory leave for necessary overtime work must be authorized in advance by the appropriate department head. It is granted on a basis of one and one-half

hours credit for each hour worked, calculated to the nearest one-half hour. Credit will not be given for less than a half hour.

Employees shall use compensatory leave as soon as possible after it is earned. No more than eighty hours may be carried over from one fiscal year to the next. When it is not convenient to use accumulated compensatory leave, as determined by the appropriate department head, that amount in excess of eighty hours at the end of the fiscal year may be converted to the employee's "leave with pay" account.

(e) Disability leave. A permanent or probationary employee who is disabled in line of duty shall receive full pay with no charge to his leave with pay account, but not exceeding ninety working days for any one injury. A temporary employee shall be paid in accordance with the provisions of the State Workmen's Compensation Act.

(f) Administrative emergency leave. The City Manager may excuse employees from duty for short periods of time without charge to leave. Examples would be extreme weather conditions, disaster, and days of national mourning or celebration.

(g) Military and civil leave:

(1) An employee who is a member of a reserve force of the United States or of the Commonwealth of Virginia and who is ordered by the appropriate authorities to attend a training period or who is called to emergency active duty for the purpose of aiding civil authority under the supervision of the United States or the Commonwealth of Virginia shall be granted, upon request, a leave of absence with pay during the period of such activity, not to

exceed 15 consecutive calendar days for training duty and five working days for emergency active duty. Any Career Service employee with permanent status who leaves the City to enter the active service of the armed forces of the United States during time of war shall be placed on military leave without pay, such leave to extend through a date ninety days after the expiration of the period of service.

(2) Employees desiring to vote in an election for national, state or local office shall be granted time off for a reasonable amount of time at the beginning or end of their regularly scheduled work day, not to exceed two hours.

(3) Full pay is given to an employee while serving on a jury.

(h) Leave without pay. An employee may be granted leave without pay by the City Manager for a period not to exceed one year. An employee on leave without pay during a portion of a pay period shall earn leave with pay in proportion to the time worked during the pay period calculated to the nearest hour.

(i) Unauthorized leave. An employee who is absent from duty without approval shall receive no pay for the duration of the absence and be subject to disciplinary action. In the absence of disciplinary action, an employee who is on unauthorized leave for three consecutive days shall be separated from the payroll. However, the employee will be reinstated if there were extenuating circumstances which made it impossible for him to notify his supervisors in regard to his absence. An employee on unauthorized leave shall not earn leave for the pay period in which such leave occurs.

Sec. 2-48. Discipline and Grievances.

(a) Kinds of disciplinary actions. If an employee's work performance or behavior is unsatisfactory, the following kinds of disciplinary action may be taken, depending upon the circumstances: oral admonishment, official reprimand, withholding of anniversary pay increase, suspension, reduction in pay or dismissal.

(b) Authority to discipline. A supervisor has the responsibility for admonishment and reprimands and for recommending other action. A department head may withhold within-grade advancement and suspend an employee up to a maximum of twenty working days. Suspension for a longer period, reduction in pay, and dismissal can only be made by the City Manager.

(c) Notification. An employee shall be given written notice before any disciplinary action other than admonishment or oral reprimand is executed. Disciplinary action which is the result of unsatisfactory work performance will not be effected until a second written notice is given the employee. The official personnel file of each employee shall be available for his inspection during normal working hours.

(d) Grievances. A grievance is a complaint based upon an event or condition which affects the circumstances under which an employee works, allegedly caused by misinterpretation, unfair application, or lack of established policy pertaining to employment conditions. A grievance shall not be interpreted to mean negotiations of wages, salaries, or general employee benefits. Employee grievances, not involving disciplinary action, whether by an individual or group of employees shall be processed as follows:

(1) Step 1. A grievance must be raised within ten work days after the event giving rise to the

grievance, or within ten work days following the time when the employee reasonably should have known of its occurrence. The grievant shall discuss the matter with his immediate supervisor who shall attempt to adjust the matter and must respond within three working days.

(2) Step 2. If the grievance is not settled by the immediate supervisor to the satisfaction of the aggrieved employee, he may present it to the appropriate department head, who shall hear the appeal and respond in writing within five working days of receipt of the appeal. If the immediate supervisor is the department head, steps one and two are consolidated into a single step.

(3) Step 3. If the grievant is not satisfied with the decision of the department head, he may file a written appeal to the City Manager, who shall hear his appeal within seven working days and render a decision within an additional seven working days.

(4) Step 4. If the grievant is not satisfied with the decision of the City Manager, he may file a written appeal to the Personnel Advisory Board within ten days of notification by the City Manager. The decision of the Board shall be binding on both parties to the dispute unless either party within ten days after receipt of the decision indicates its intent to appeal to the City Council. The Council shall request both parties to submit their respective positions to the Council. After consideration of the positions of the parties, the Council may either

elect or decline to review the decision of the Board. In the event the Council elects to review the decision, it shall render a final and binding decision on the grievance as soon as possible thereafter. In the event the Council declines to review, the decision of the Board shall become final and binding.

(5) Employee representation. At any or all steps the grievant shall be permitted to be accompanied or represented by an individual of his own choice.

(6) No reprisal. It shall be unlawful for any supervisor or other management official to make a reprisal against an employee on account of a grievance.

(7) Waiver of time limits. By mutual agreement, the parties to a grievance may extend any or all of the time periods established in this procedure. Failure by the employee to process a grievance within the time limits, or agreed upon extension, shall constitute termination of the grievance.

(e) Appeal of disciplinary action. An employee who has been suspended, reduced in pay, or dismissed may present an appeal to the Personnel Advisory Board within ten working days of the notification of the action. The Board shall hear the appeal within twenty days and submit its decision to the City Manager within ten days of the hearing. If the Board decides that the disciplinary action was unjust, the employee shall be reimbursed for lost pay to the extent determined by the Board. The decision of the Board shall be binding except as provided in this section in paragraph (d), subparagraph (4).

Sec. 2-49. Political Activities.

(a) All employees of the Career Service shall be protected against any unwarranted infringement on their rights as American citizens to vote as they choose, to express their opinions and to join any legitimate political organization whose purposes are not inconsistent with their loyalty to the United States.

(b) It shall be unlawful for any official in the service of the City of Fairfax to reward or to discriminate against any applicant for a position or any employee because of his political affiliations or political activities as permitted by this section.

(c) No special consideration shall be given to any endorsements or recommendations from any national, state, or local political party, or officer thereof, in making appointments, promotions, or dismissals in the Career Service.

(d) No employee in the Career Service shall take an active public role in any campaign on behalf of a candidate for a City of Fairfax office.

(e) No employee of Fairfax City shall take part in soliciting any assessment, subscription, or contribution for any political organization from any employee in the Career Service.

Sec. 2-50. Ethics.

(a) Conduct. City employees are expected to discharge their duties conscientiously and to conduct themselves in a manner, both on and off the job, which will reflect favorably upon the City government.

(1) Each employee will refrain from any use of his official position which is motivated by the desire for private gain for himself or other

persons. He must conduct himself in such a manner that there is no suggestion of the extracting of private advantage from his City employment.

(2) Each employee will exercise care in his personal financial activities to avoid any appearance of acting on the basis of information obtained in the course of performing his City duties.

(3) An employee will not use his City position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or to other persons.

(4) An employee will avoid any action which might result in giving preferential treatment to any organization or person; losing his independence or impartiality of action; or affecting adversely the confidence of the public in the integrity of the City government.

(b) Gifts and gratuities. An employee shall not accept gifts, gratuities or loans from organizations, business concerns, or individuals with whom he has official relationships on business of the City government. These limitations are not intended to prohibit the acceptance of articles of negligible value which are distributed generally, nor to prohibit employees from obtaining loans from regular lending institutions. It is particularly important that inspectors, contracting officers, and enforcement officers guard against any relationship which might be construed as evidence of favoritism, coercion, unfair advantage, or collusion.

(c) Conflict of interest. Employees in the Career Service shall not engage in any employment, activity or enterprise which has been or may be determined to be

inconsistent, incompatible, or in conflict with the duties, functions, or responsibilities of their City employment. An employee who desires to accept outside employment in addition to his regular City position must obtain the permission of his department head for such outside employment.

This ordinance shall become effective on July 1, 1974.

Introduced: March 19, 1974.

Adopted: May 21, 1974.

/s/ John W. Russell
Mayor

Attest:

/s/ Dorothy L. Winkinson
City Clerk

APPENDIX F

ORDINANCE NO. 1975-27

AN ORDINANCE AMENDING ARTICLE VIII OF CHAPTER TWO OF THE CODE OF THE CITY OF FAIRFAX, VIRGINIA, ENTITLED, "PERSONNEL ADMINISTRATION FOR EMPLOYEES IN THE CAREER SERVICE."

BE IT ORDAINED by the City Council of the City of Fairfax, Virginia, that Article VIII of Chapter 2 of the Code of the City of Fairfax, Virginia, entitled, "Personnel Administration for Employees in the Career Service", be and it hereby is amended as follows:

(A) Delete the last portion of the last sentence of subsection (c) in Section 2-46 which reads, "satisfactory as certified by his department head to be eligible for within-grade advancement.", and insert the following in that place, "continually of a high quality and rated (certified) at least satisfactory or standard by his department head on the City's performance rating form in order for the employee to be eligible for within-grade advancement."

(B) Substitute a comma for the period ending the last sentence of the last paragraph of subsection (b) in Section 2-47 and add the following as the ending for that sentence, "not to exceed payment for 15 additional days (120 hours)."; and then add the following new sentence as the ending for that paragraph, "This 45-day limit shall apply for leave accrued from the date of the adoption of this ordinance."

(C) Add the following at the end of paragraph (4) of subsection (d) of Section 2-48, "The Personnel

Advisory Board shall act upon a written appeal within a reasonable period of time subsequent to its receipt. For this purpose, a reasonable period of time usually will not exceed 45 days. If due to extenuating circumstances this time limit cannot be met, the grievant will be informed in writing of the reason for the delay and when he can expect the Board to act."

This ordinance shall be effective immediately upon its adoption.

Introduced: June 3, 1975.

Adopted: June 17, 1975.

/s/ Nathaniel F. Young
Mayor

Attest:

/s/ Dorothy L. Wilkinson
City Clerk

APPENDIX G

ORDINANCE NO. 1975-52

AN ORDINANCE AMENDING ARTICLE VIII OF CHAPTER TWO OF THE CODE OF THE CITY OF FAIRFAX, VIRGINIA, ENTITLED, "PERSONNEL ADMINISTRATION FOR EMPLOYEES IN THE CAREER SERVICE.

BE IT ORDAINED by the City Council of the City of Fairfax, Virginia, that Article VIII of Chapter 2 of the Code of the City of Fairfax, Virginia, entitled, "Personnel Administration for Employees in the Career Service," be and it hereby is amended as follows:

Delete in its entirety subsection (b) of Section 2-47 and insert the following for that subsection:

"(b) The City grants annual and sick leave.

"(1) ***Annual Leave.***

"Annual leave shall be granted full-time employees for vacations, emergencies and other personal uses and after a minimum of six months of continuous service with the City. During the first six months of employment, any time off from work under this category shall be charged to Leave Without Pay unless circumstances warrant an exception by the City Manager. At the completion of the first six months of employment, annual leave accrued during that period will be credited to the employee's account.

"Annual leave shall be accrued at the following rates:

. . . with less than three years service, employee earns four hours leave per pay period. . . .

. . . with less than fifteen years service, employee earns six hours leave per pay period. . . .

. . . with fifteen or more years service, employee earns eight hours leave per pay period. . . .

"Except in cases of illness or emergencies, leave must be approved in advance. The minimum leave increment is one hour. Each employee can accrue up to 30 days annual leave or up to the number of days of annual leave which that employee had accrued as of the date of the adoption of this ordinance, whichever is greater.

"Each full-time employee can carry over an accrued annual leave balance up to said maximum accrued annual leave from year to year during continuous service. Each employee shall be required to use a minimum of 10 days annual leave each year. If an employee fails to use this amount, it will be deducted from his leave balance on December 31 of each year.

"Leave accrued prior to July 1, 1974, shall be reconstituted into annual and sick leave as accrued by each employee as of that date. Leave accrued from July 1, 1974, up to the date of adoptiong of this ordinance shall be treated as annual leave.

"*Payment for annual leave.*

"Upon separation or retirement, full-time employee with over six months continuous service shall be paid for all accrued annual leave as defined hereinabove in the manner set forth hereinafter. Up to a maximum of 30 days accrued annual leave shall be paid on the basis of one day for each day of annual leave accrued. Accrued annual leave in excess of 30 days shall be paid on a ratio of one day for each two days accrued.

"(2) *Sick Leave.*

"Sick leave shall be accrued by full-time employees on a basis of four hours for each two week pay period.

"It is the policy of the City to grant sick leave to employees for illness or injury of sufficient seriousness to prevent the employee's attendance for duty. Sick leave is only to be used when actually warranted. When there is reason to believe sick leave is being absued, a licensed physician's certificate or written explanation may be required of the employee by his/her supervisor, his Department Head or the City Manager for the period of absence.

"In each case in which an employee is unable because of personal injury or illness to report to duty, it shall be his responsibility to inform, or have someone inform his responsible supervisor within four hours after the time he is due at work on the initial day of his incapacity. Failure to inform the responsible supervisor, without reasonable extenuating circumstances shall result in the absence being classified as Unauthorized Leave.

"No payment will be made for sick leave accrued upon separation or retirement from City service."

This ordinance shall become effective immediately upon its passage by the City Council of the City of Fairfax, Virginia.

Introduced: September 16, 1975.

Passed: October 20, 1975.

/s/ Nathaniel F. Young
Mayor

Attest:

/s/ Dorothy L. Wilkinson
City Clerk

Record No. 82-1112

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

LEONARD P. KLINE,
Petitioner,

vs.

THE CITY OF FAIRFAX, VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION FOR RESPONDENT

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* MICHAEL C. MONTAVON
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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

May a municipal government, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, experiment with and modify its procedures for payment of accrued sick leave at retirement when, under Virginia law, there are no contract or property rights involved, there are no vested rights involved, when Petitioner Kline was compensated fully in accordance with the ordinances in effect at the date of his retirement and when Kline never had any of his accrued sick leave taken away?

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Petitioner,

vs.

THE CITY OF FAIRFAX, VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION FOR RESPONDENT

STATEMENT OF JURISDICTIONAL GROUNDS

Kline applies to this Court for a writ of certiorari pursuant to 28 U.S.C. § 1257(3). However, this case draws into question the validity of a state statute, which includes a municipal ordinance, *Reinman v. City of Little Rock*, 237 U.S. 171, 59 L.Ed. 900 (1915), on the ground of its being repugnant to the United States Constitution. The decision of the Circuit Court of Fairfax County, Virginia was that the Ordinance is valid. The Supreme Court of Virginia affirmed this decision, finding no reversible error. Therefore, this matter properly comes before this

Court on appeal, pursuant to 28 U.S.C. § 1257(2), and not a Petition for Writ of Certiorari, as claimed by Kline.

As the proper jurisdictional basis for this matter is by appeal under 28 U.S.C. § 1257(2),[1] Kline is required to comply with Rules 15.1 (e)(ii), (h) and (j)(iv) of the Rules of this Court. The Order of the Supreme Court of Virginia denying review of this action was entered October 8, 1982. Under 28 U.S.C. § 2101(c), a Notice of Appeal must be filed with the state court within ninety days of the date of the judgment appealed from. No notice of appeal has, as of the date of this brief, been filed by Kline in the Supreme Court of Virginia. Accordingly, Kline has not noticed his appeal to this Court in a timely fashion and therefore, his appeal must be dismissed. *Donner v. Anton*, 444 U.S. 958, 62 L.Ed.2d 371 (1979).

Alternatively, even if this Court believes it has jurisdiction to entertain this action on a petition for a writ of certiorari, the Petition should be denied for the reasons discussed below.

STATEMENT OF THE CASE

This case arises from a former municipal employee's objection to one small part of the evolving comprehensive personnel administration plan of the City of Fairfax, Virginia. Petitioner Kline retired, as the Chief of Police of the City of Fairfax, in June, 1977, and was fully compensated in accordance with the ordinances then in effect. Nevertheless, Kline seeks to obtain the benefits of an earlier ordinance, even though he did not retire when that earlier ordinance was in effect, although he knew the earlier ordinance was going to be modified. (Tr. Tran., p. 164)

Due to its evolutionary nature, many aspects of the personnel plan of the City of Fairfax have been modified

[1] Cf. *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981).

and limited since its original passage. Kline makes no objection to the City's ability to limit major benefits in the original plan, and even concedes that it is the City's perogative to do so. (Pet., p. 10). Nevertheless, Kline objects to one change in the City's plan because he claims he "relied" upon the former provision, although his own testimony makes clear he did not. In reviewing the ordinances set out below, it is important to keep in mind that Kline's contention is that he is entitled to be paid for all of his accrued sick leave on retirement, not that he was entitled to sick leave which was denied him. Not one day of sick leave which Kline accrued was ever denied or taken from him.

In addition, the City feels obligated to point out that much of the "factual background" asserted by Kline is not established in the record of this case. For example, the Petition references the deposition transcript of McNayr, Fleck, Foster, and Thomas were never admitted in evidence and were one of the bases for Kline's Petition for Appeal to the Virginia Supreme Court. (Pet. to Va. Sup. Ct., p. 26-27).

Prior to July 1, 1974, the City of Fairfax had a policy, but no ordinances, setting forth leave policies for its employees. The City's policy regarding leave was that, upon retirement, an employee would be paid in full for accumulated annual leave up to a thirty day maximum. If accumulated annual leave was less than thirty days, accumulated sick leave would be credited, at the ratio of three days sick leave for one day annual leave, until the thirty day annual leave maximum was met. Thus, prior to 1974, Kline did not work with the expectation that he would be paid for his accumulated sick leave, as such, upon retirement. Rather, his accrued sick leave was available to be used as a fractional credit towards reaching the ceiling of thirty days annual leave for which payment would be made at retirement. All other accrued leave in excess of this maximum was not compensated in any manner at retirement. Kline worked under this pol-

icy from 1953 until July 1, 1974, at which time Ordinance No. 1974-4 was adopted.

Ordinance No. 1974-4 was adopted on May 21, 1974 by the City of Fairfax, as required by Virginia Code § 15.1-7.1, to provide for a system of comprehensive personnel administration. This Ordinance became effective July 1, 1974 (Pet. App. 8a). The portion of this comprehensive personnel Ordinance relevant to this action, section 2-47(b), provided in part, for a single classification of leave. Upon retirement, an employee was to be paid in full for all accrued leave upto a maximum of 240 hours. Leave in excess of 240 hours was to be paid at a ratio of one day for each two days accrued. Employees who retired while this Ordinance was in effect were compensated as specified in the Ordinance. As can be seen, the net effect of this Ordinance was to allow employees to be paid at retirement for accrued sick or annual leave in excess of the old thirty day maximum.

In June 1975, the City amended the foregoing Ordinance by passing Ordinance No. 1975-27. This amendment provided that accrued leave in excess of 240 hours was to be paid at retirement at the same ratio of one day for each two days accrued, pursuant to the 1974 Ordinance, but that such payments would not be made for any leave in excess of 120 additional hours. Thus, a limit of 45 days was placed on the amount of leave an employee could accrue for purposes of payment at retirement. This forty-five day limit was to be applied prospectively, only to leave accrued from June 17, 1975, the date the Ordinance was adopted.

Although this amendment clearly limits the amount of leave to be compensated at retirement as originally set forth in the 1974 Ordinance, Kline makes no objection to it. In fact, he concedes that it is the City's perogative to do so. (Pet., p. 10). Nevertheless, Kline asserts the City could not make the next change in the City's evolving personnel plan.

On October 20, 1975, the City adopted the Ordinance in question in this case, Ordinance No. 1975-52, which amended the earlier 1975 Ordinance. This Ordinance re-established two categories of leave (sick leave and annual leave) for leave accrued from October 20, 1975 forward; it designated as annual leave *all* leave accrued from July 1, 1974 through October 20, 1975, and it reconstituted leave accrued prior to July 1974 into the two leave categories (sick and annual) which had then eixsted in the amounts as it had then existed for each employee. Upon retirement, eligible full-time employees would be paid for all their accrued annual leave on the basis of one day for each day of annual leave accrued up to a maximum of thirty days. Accrued annual leave in excess of thirty days was to be paid on a ratio of one day for each two days accrued. Thus, the Ordinance increased the amount of compensation available at retirement by eliminating the forty-five day limit. It is noteworthy that Kline does not object to this part of Ordinance No. 1975-52. It is also noteworthy that this Ordinance was more generous in terms of the compensation available at retirement than had been the case prior to the original 1974 Ordinance. It is true that under Ordinance No. 1975-52, no payment was to be made for accrued sick leave at retirement, but no such leave was taken away. Up until July 1, 1974, no City employee, including Kline, expected to be paid for accrued sick leave at retirement, except insofar as such leave, on a three-to-one ratio, would be credited towards the maximum payment of thirty days annual leave. Because Kline had well in excess of thirty days accrued annual leave on July 1, 1974, and also on his retirement, none of his sick leave would have been credited towards the thirty day annual leave limitation. The net effect of the final 1975 Ordinance, which is the only Ordinance in this entire scheme Kline challenges, was to eliminate crediting sick leave towards the amount of annual leave to be paid at retirement, which did not affect

Kline, and also *to eliminate* the old thirty day maximum on annual leave, which greatly benefited Kline.

From July 1, 1974 through October 20, 1975 Kline worked under the expectation that all "leave" accumulated from July 1, 1974 through October 20, 1975 would be credited towards the amount to be paid at retirement. The Ordinance in question honored that expectation by treating all such leave as annual leave.

In 1975, Kline knew that Ordinance No. 1975-52 was going to be passed by the City. (Tr. Tran., p. 163-165) Nonetheless, he chose not to retire before October 20, 1975 although he was eligible to do so, and he thereby lost his right to be compensated under the terms of the Ordinance then in effect. By his own admission Kline's decision when to retire was made without any regard to which Ordinance governed compensation for accrued leave at the time he retired. (Tr. Trans., p. 163-165) Contrary to the allegations in his Petition, Kline's own testimony shows he did not rely upon the compensation scheme for accrued sick leave in his decision not to retire. (Tr. Trans., p. 165) In accordance with the provisions of Ordinance 1975-52 in effect at the time of his retirement, Kline was paid for his accrued annual leave, including the "sick" leave accrued after July 1, 1974 which was treated as annual leave, when he retired. Because the Ordinance did not provide for compensation for other accrued sick leave, he was not so compensated.

Kline thereupon instituted suit against the City seeking payment for this other accrued sick leave despite the clear terms of the Ordinance. The Circuit Court of Fairfax County, Virginia dismissed Kline's suit on the merits, finding no property or vested rights. Thus, due process considerations need not and were not reached. The Supreme Court of Virginia affirmed the Circuit Court's judgment finding no reversible error and refusing Kline's Petition for Appeal. (Pet. App. 1a.) *See* Va. Code Anno. § 8.01-675 (Repl. Vol. 1977); *VEPCO v. Clark*, 179 Va. 596, 19 S.E.2d 693 (1942). This action followed.

SUMMARY OF THE ARGUMENT

The due process clauses in the amendments to the United States Constitution protect life, liberty, and property rights from arbitrary deprivation. Before he can show that the City violated his due process rights, Kline must first show that he had a property right to be compensated at retirement for that portion of his accrued sick leave in question and that the City deprived him of it.

The due process clauses do not provide the sources of the property rights. Generally, these are derived from state law. Therefore, in order to establish a violation of the due process clause, Kline must show that he had a property interest in being compensated at retirement for the sick leave in question under Virginia law. Under Virginia law, a municipal employee, in Kline's position, has no such property interest generally, and certainly not under the facts of this case. Moreover, the facts make clear that Kline was not deprived of any right to compensation he had upon his retirement.

ARGUMENT

Contrary to Kline's assertions, this case does not present a federal question worthy of this Court's review. In point of fact, this case does not present a federal question at all. Kline agrees that this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972) sets forth the standard for this case. *Roth* holds that (1) before due process protection is triggered, the plaintiff must have a liberty or property right at stake, and (2) these rights are derived from sources other than the United States Constitution, generally from state law. Thus, the real issue in this case is whether under Virginia law, Kline has a vested property right in one small segment of the City's evolving scheme for compensating accrued sick leave at retirement. The Virginia courts have ruled that he does not. Kline asks this Court to

undertake a full review of Virginia's interpretation of her own law that Kline had no such right. Such a case does not meet any of the criteria for a grant of a writ of certiorari as set forth in Rule 17 of Rules of this Court, nor is there any other reason for this Court to review this matter. Therefore, Kline's Petition should be denied.

I. As a public employee of the City of Fairfax, Virginia, Kline had no property or contract rights in the terms of his employment, and particularly no property or contract rights sufficient to preclude the City of Fairfax from changing its policies regarding payment for accrued sick leave at retirement.

The Fourteenth Amendment to the United States Constitution prevents any state from "depriving any person of life, liberty, or property, without due process of law." In interpreting and applying this section of the Constitution, this Court has stated that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an indpendent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561 (1972). Kline agrees that this is the federal standard governing this case. (Pet. p. 11) Thus, this case does not present a federal question for this Court to review. Instead, it is a question of Virginia law on Kline's retirement entitlements.

Assuming this Court undertakes a review of Virginia law, the first question presented by this case is whether

or not Kline had a property right, under Virginia law, to compensation at retirement for the accrued sick leave in question. There can be no doubt that the law of Virginia is that a public officer, such as Kline, former Chief of Police of Fairfax City, does not have a right, of any kind, to get or keep a public position or office, or to get or maintain any specific compensation for a public position or office.

As stated by the trial court in its Letter Opinion, (Pet. App. p.4a), the governing law in Virginia is clear: "the nature of [Kline's] employment with the City is 'inconsistent with either a property or contract right.'" As the Virginia Supreme Court stated in *Loving, et al. v. Auditor of Public Accounts*, 76 Va. 942, 946-48 (1882) (emphasis added):

> For obvious reasons of public policy, it is well settled that the power of the legislature in respect to changing the compensation of public officers is absolute, except so far only as its powers may be limited by the fundamental law of the State. . . . *The services rendered by public officers do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto.* As to a stipulated allowance, that allowance, whether annual, per diem or the particular fees for particular services, depends on the will of the law-makers. . . . As we have seen, there was no contract between the State and Taliaferro that his compensation should remain unchanged during his term of office; and that the power of the legislature to change it was *absolute and unquestionable.*

To the same effect is *Frazier v. Virginia Military Institute*, 81 Va. 59, 62 (1885), where the Supreme Court of Virginia stated:

> It must be regarded as settled, that with regard to appointments to offices like the one in this case, there is nothing like a contract raised as to the salary, emoluments or allowances attached to the office.

The following decisions are similar: *Booker v. Donohoe*, 95 Va. 359, 363, 28 S.E. 584 (1897) (emphasis added):

> In this country offices are not hereditaments, and the right to hold office and receive its emoluments does not grow out of any contract with the State, and that an office is not property in the sense that cattle and land are property of the owner . . . the legislature may abolish the office during the term of the incumbent or diminish the salary, *or change the mode of compensation*, subject only to Constitutional restrictions. . . .

Sinclair v. Young, 100 Va. 284, 290-91, 40 S.E. 907 (1902) (citations omitted):

> Members of electoral boards are not Constitutional officers. The office is a legislative creation; and an election to it does not constitute a contract. When a noffice is created by statute it is wholly within the control of the Legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. There are no constitutional limitations upon that power, and the Legislature may exercise it without let or hindrance.

Johnson v. Black, 103 Va. 477, 489-91, 49 S.E. 633 (1905) (emphasis added):

> Services rendered by public officers do not partake of the nature of contracts and have no affinity thereto. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. . . . [A public officer] cannot legally claim additional compensation for the discharge of [his] duties, even though the salary be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties within the scope of the charter powers pertaining to the officer are increased but not his salary. *Whenever he considers the compensation inadequate, he is at liberty to resign.*

More recently, the Virginia Supreme Court affirmed these principles in *Walker v. Massie*, 202 Va. 886, 889, 121 S.E.2d 448 (1961), stating:

> Public offices are not held by grant or contract; but are created by the law-making power, and no person has a vested right in them.

The policy behind these rules of law is obvious. Any benefit given by the government to its employees must necessarily be paid by the public. Flexibility must therefore be maintained not only to satisfy competing social policies and programs, but also to insure fiscal soundness. To rule otherwise is to mandate the perpetuation of all prior personnel policies as well as all prior social policies and programs generally. This would deter legislative experimentation as well as possibly forcing municipal bankruptcies. It would also be hostile to the principles of democratic, representative government.

The public officer, such as Kline, must be deemed to undertake his duties with knowledge of these principles. Unlike the private employee, the public officer knows that a number of restrictions can be placed upon him or her which may not be permissible in the private sector. Various outside activities presenting possible conflicts of interest can be proscribed, as can various financial disclosure requirements. Political activity can be restricted in ways that would be constitutionally offensive in the private sector. So, too, the public officer is chargeable with the knowledge that the office itself can be abolished, its duties changed, or the emoluments of the office radically altered. As the Virginia Supreme Court stated in *Walker*, faced with any such change the public officer has two choices: first, he can accept the alteration and continue employment; or second, the public officer can quit. The greater good of the public requires such a policy, a policy which is simply one of the facets of public employment.

This review of Virginia law clearly shows that Kline had no property or contract right to his job or his compensation at any specified rate. Accordingly, he cannot claim any vested rights in general, nor specifically with respect to the City's scheme for compensating accrued leave at retirement.

II. Ordinance No. 1974-4, which was the first of three ordinances regarding the City's policies for payment of accrued leave at retirement, did not confer vested contract or property rights on Kline.

The original 1974 Ordinance, No. 1974-4, for the first time formalized, in a comprehensive manner, the personnel plan of the City of Fairfax. With respect to payment at retirement of accrued sick leave, it changed the policy which had previously been in effect. This Ordinance was one of a series of measures which were developed over time to provide a system of personnel administration that was consistent with fiscal integrity. On its face, Kline's challenge to one small section in one of these three Ordinances, while conceding, either expressly or implicitly, the validity of the other changes and modifications, is without merit. The situation would be different if Kline had been told that he would receive a specified amount of compensation, had performed his job with that expectation, and then was told he would be compensated in a lesser amount. If that were the situation, Kline may well have some property rights. But that is not the situation before this Court. Kline worked from 1953 until July 1, 1974 with the understanding that he would be compensated upon retirement for a maximum of thirty days accrued annual leave and no compensation for accrued sick leave.[2] Under Ordinance

[2] Accrued sick leave could be converted into annual leave to reach the thirty day maximum at a ratio of three sick leave days to one annual leave day. Because Kline had in excess of thirty days accrued annual leave on July 1, 1974 (Pet. p. 11), he would receive no compensation for his accrued sick leave.

No. 1975-52, Kline was compensated precisely in the manner he had expected when he worked those days from 1953 until July 1974.

From July 1, 1974 until June 17, 1975, during which Ordinance No. 1974-4 was in effect, Kline worked expecting to be compensated at retirement for the leave he was accruing. Ordinance No. 1975-52, which is the Ordinance Kline challenges, paid him for that leave.

From July 17, 1975 until October 20, 1975, during which Ordinance No. 1975-27 was in effect, Kline worked knowing the leave he was accruing would be compensated at retirement up to a maximum of forty-five days. Ordinance 1975-52 paid him as he expected. Although Ordinance No. 1975-27 clearly limits the benefits of Ordinance No. 1974-4, Kline makes no objection to it and even concedes that it was a legitimate exercise of the City's authority to do so. (Pet. p.10)

From October 20, 1975, when Ordinance No. 1975-52 went in effect, Kline worked with the knowledge that he would be compensated at retirement for his accrued annual leave only. He was paid as he expected.

The only remaining theory on which Kline can be relying to show a property right is that when the City enacted its original 1974 Ordinance, No. 1974-4, it vested its employees with a scheme for compensating accrued leave at retirement that cannot ever be changed. If this were true, then it seems the 1974 Ordinance itself would be invalid, given the fact that the City had a previous policy towards compensating accrued leave at retirement. Kline advances no good reason as to why the original scheme established by policy, as opposed to Ordinance, is somehow not immutable, while the original comprehensive Ordinance is. Moreover, Kline's position would appear to prevent any modification of a retirement scheme, whether public or private. Not only is such a position devoid of logical merit, but it would imperil all retire-

ment systems, including Social Security. Certainly, both public and private retirement plans can be changed. In particular, the City of Fairfax can lawfully change its method for compensating accrued leave at retirement when Kline himself was fully compensated for all such leave under the expectation he had during the time when he was accruing the leave. Moreover, Kline's theory ignores the facts established in this case, confuses earned compensation and benefits, and overlooks the fact that Kline's entitlement to the benefit involved was contingent, not vested.

a. Contrary to the assertions in his Petition, Kline did not rely upon the expectation of payment at retirement of his accrued sick leave.

Throughout his Petition, Kline attempts to posit a case of detrimental reliance. The facts of this case are otherwise. Specifically, Kline himself did not rely upon the scheme for compensating accrued leave at retirement in making his decision on when to retire. Obviously, Kline's retirement entitlements were governed by the Ordinance in effect on the date of his retirement. When Kline retird, he receives the full benefits of the Ordinance then in effect.

A review of Kline's deposition testimony clearly shows that Kline had no detrimental reliance.

> [Counsel for Defendant] Q. From the time you came there in August of '54 until your retirement, you never really considered leaving the City and working somewhere else?
>
> [Plaintiff] A. No, sir, I wanted to be a policeman, and that's what I was.
>
> . . . .
>
> Q. Would that include the time of all of these changes in the retirement plan and the accumulated leave plan?

A. Yes, sir. In fact, I could have retired. *I knew of the ordinance change prior, in enough time that I could have retired if I wanted to and collected my money.*

. . . .

Q. So you would have been eligible for retirement on August 13, 1974. Is that right?

A. Yes, sir. I could retire before the revised, before the, between the time they renewed the grandfather clause and drafted the last ordinance. *If I had wanted to retire, I could [sic] retire during that period and collected my money and I wouldn't be here today.*

Q. Why didn't you?

A. Because I didn't want to retire.

Q. Was there any financial reason why you didn't want to retire?

A. No, sir.

Q. Was there no increased retirement compensation associated with working longer than 20 years?

A. *Yes, but that had nothing to do with it.*

. . . .

Q. Okay. If you say that wasn't a factor, what was your reason for not wanting to retire?

A. Well, I just wanted to stay in the Police Department. I liked the work.

Q. You had just enjoyed your job, and you wanted to stay there.

A. Yes, sir.

Deposition of Leonard P. Kline, pp. 20, 21, 22 (Oct. 15, 1979) (emphasis added)

Kline's testimony at trial was essentially the same. (Tr. Tran. p. 161-165) Kline has thus admitted that he elected to retain his position with the City for reasons wholly

outside the City's scheme for compensating accrued sick leave at retirement. He obviously enjoyed his job and wished to continue for that reason alone. Clearly, Kline did not rely to his detriment upon the expectation of being compensated at retirement in accordance with the terms of the original 1974 Ordinance. Yet, in this action, that is precisely what he seeks. This is not a case of detrimental reliance by Kline; on the contrary, it is a case of a knowing and intelligent waiver by Kline of his available benefits under the terms of the 1974 Ordinance. He knew he could have retired and received those benefits, but for personal reasons, he chose not to. Having made his decision not to retire during the time when that Ordinance was in effect, when he knew or should have known the consequences of that decision, he cannot be heard to complain now; particularly since the 1975 Ordinance increased the benefits he expected when he worked from 1953 through 1974 by removing the thirty day limit on payment for accrued annual leave.

b. Kline confuses earned compensation with employee's benefits.

To the extent that Kline considers sick leave to be a compensable benefit of the same nature as annual leave, his argument fails for lack of factual basis. The fact is that in Virginia, as clearly stated by the trial court, sick leave is considered a different emolument of employment than annual leave. (Pet. App. p. 5a) As can be seen from the limitations on the use of sick leave in the city's pre-1974 policy and under the 1975 Ordinance, it is a benefit of employment to assure that employees are not penalized by the unfortunate and involuntary circumstance of being injured or ill.[8] (Kline Tr. Exh. 1).

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[8] The pre-1974 policy of the City on sick leave is analogous, for example, to military leave. An employee is not penalized for his or her service to the country, but would not be compensated for the military leave *benefit* if he or she were not a member of the Armed Services. (Kline Tr. Exh. 1).

As the trial court stated in its letter opinion, an appropriate and accurate analogy to sick leave is term life insurance. "Should the insured party survive beyond the term of the policy no benefit is obtained and the premiums paid during the term are lost." (Pet. App. p. 5a) In the Virginia proceedings, Kline attempted to avoid the analogy, arguing instead that sick leave could be compared to either term life insurance or whole life insurance, and the City chose a "whole life" program and then changed to a term life program. (Pet. to Va. Sup. Ct., p. 23) Even assuming *arguendo* this were true, Kline is simply incorrect in stating that the City may not legally "switch" policies. As conceded on page 11 of his Petition for Appeal to the Virginia Supreme Court, Kline agrees that the "City may choose to pay or not to pay for unused 'sick leave' at its discretion."

As noted previously, the City's leave policies, like that of all governments, are evolutionary in nature. Kline cites no authority to suggest that once a given policy is adopted, it may never thereafter be changed.

Unlike sick leave, annual leave is more akin to *earned* compensation (like a salary), to be taken at the will of the employee for whatever purposes he or she sees fit.[4] The cases largely relied on by Kline support this distinction, holding that employees who have earned compensation (like wages, salary, commissions, vacations) cannot be divested of it. However, these cases are cited by Kline indiscriminately as if they were applicable to sick leave. For example, Kline cites *Mississippi v. Miller*, 276 U.S. 1974, 72 L.Ed. 517 (1928), as apparently applicable to sick leave when it is actually applicable to compensation in the form of commissions on the amount of delinquent taxes collected by the plaintiff. (Pet., p. 13.) Clearly,

[4] The City does not concede, however, that annual leave *is* a form of earned compensation. Instead, the City simply wishes to point out that annual leave is more easily aligned with a compensation analysis than is sick leave.

such compensation was in fact earned *salary*, not sick leave benefits. Similarly, Kline cites *Bennett ex rel. Arizona State Personnel Commission v. Beard*, 27 Ariz. App. 534, 556 P.2d 1137 (1976), as relevant to this case when Kline admits the decision only concerns annual leave (Pet. p. 14.)

In addition, on page 16 of his Petition, Kline cites *Ramey v. State*, 296 Mich. 449, 296 N.W. 323 (1941) although it is clear from the direct quote used by Kline that it was applicable to vacation with pay, i.e., annual leave:

> Under the facts in this case, plaintiffs had performed all acts necessary to insure themselves the right of a *vacation with pay*, or if dismissed before exercised, to receive compensation for the unused portion of their annual leave allowances. There was nothing remaining for them to do except exercise the right which depended on no contingency, but was complete and matured. *In my opinion, vacation with pay is not a gratuity; it is compensation for services rendered.* It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation.

(citations omitted and emphasis added)

It must be remembered that Kline's burden is to establish that under *Virginia* law he has a property right to payment of his accrued sick leave. Kline's citations to the law of other jurisdictions which may give their public employees the right to such compensation does not establish Kline's right to such in Virginia. The trial court concluded that Kline had no such right in Virginia and the Supreme Court of Virginia affirmed that decision.

Moreover, Virginia is not alone in the position that sick leave is a benefit of, and not compensation for em-

ployment and that a municipality's policy of paying employees for accrued sick leave may be changed at any time since the right to such pay was not vested. *See, e.g., Hajek v. City of St. Paul*, 35 N.W.2d 705 (Minn. 1949)

In a case of precedential value to this matter, the Supreme Court of Indiana, in *Ballard v. Bd. of Trustees*, 324 N.E.2d 813, 815 *appeal dismissed*, 423 U.S. 806, 46 L.Ed.2d 27 (1975) dealt with an action brought by a retired city policeman for restoration of his pension which had been terminated subsequent to his conviction of a felony. The Supreme Court of Indiana noted that:

> pensions under a state compulsory contribution plan like the Police Pension Fund have traditionally been considered gratuities from the sovereign involving no agreement of the parties and, therefore, creating no contractual rights. . . .

The *Ballard* court continued by observing that:

> The involuntary plans are gratuities from the sovereign as distinguished from voluntary or optional pension plans, normally called 'annuities,' where there is an agreement that a deduction shall be made out of the salary of the employee. . . . In a voluntary system the employee theoretically may keep his money or pay it back to the fund, while under the involuntary system the money, although denominated compensation, is never owned or controlled by the employee but retained by the state and is therefore, in practical effect a contribution by the state. Under this theoretical distinction there is no vested right in the money residing in an involuntary or compulsory pension system.

An analogy may be drawn between the facts of the present case and those of *Ballard*. Here, Kline participated in a "compulsory" sick leave system in the sense that he accrued leave whether he wanted or not. Such leave, like the pension monies referred to in *Ballard*, is "in practical effect a contribution by the [city]." *Id.* Such circum-

stances clearly provide no vested right to the "gratuity" provided by a government to its employees.

Since *Ballard* was brought to this Court on appeal, the dismissal of the appeal is a decision on the merits and of precedential value in the determination of like issues. *Hicks v. Miranda*, 422 U.S. 322, 344, 45 L.E.2d 223 (1975). *Ballard*, therefore, is direct authority from this Court supporting the City's position.

c. Kline has no right to seek the benefits of Ordinance No. 1974-4, nor did any rights thereunder vest because Kline failed to meet the contingency of retiring during the effective period of the Ordinance.

Even if Kline could show that he had a contract or property right to compensation for accrued sick leave at retirement and that payment for unused sick leave is compensation, not a benefit, Kline cannot show that his rights to such were vested. Again returning to Virginia law to establish a property interest, the Virginia Supreme Court has defined when a right is vested, saying "we would define it as a right, so fixed, that it is not dependent on any future act, contingency, or decision to make it more secure." *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37, 45, 124 S.E. 482 (1924). A review of the Ordinance shows that Kline's "rights" were not vested. Ordinance 1974-4 clearly states that "[*u*]*pon separation or retirement* an employee shall be paid in full for all accrued leave. . . ." (emphasis added)

Kline did not take that last step that would make his right secure, he did not retire while Ordinance No. 1974-4 was in effect, although he was eligible to do so and aware of its impending modification. His right to the benefit conferred was contingent upon his retirement during the period the Ordinance was in effect. Kline failed to meet that contingency and his rights never vested.

Contrary to the statements in his Petition, Kline did not rely upon the continuation of the benefits in Ordinance No. 1974-4. All Kline had to do to satisfy the condition of his collecting the compensation of which he now complains was retire sometime after July 1, 1974 and before October 20, 1975, before Ordinance 1975-52 became effective. Although he had the opportunity to do so, he chose not to. Most importantly, in so choosing, he did not rely on the continuation of Ordinances 1974-4 and 1975-27. Instead, Kline merely wanted to continue working. He made his own choice, and now seeks to avoid the effects of that choice. Having made that choice, Kline is now estopped from claiming compensation for accrued sick leave under an Ordinance upon which he did not rely.

III. Kline was not deprived of any compensation for which he had agreed to work for the City.

As previously pointed out, during the various stages of the City's evolutionary personnel plan, Kline was accruing leave under different sets of expectations. When he retired, he was compensated in accordance with those expectations. He should not be heard to ask for more.

CONCLUSION

In order to show a violation of due process, Kline must show that he has a property right under Virginia law to be compensated at retirement for the sick leave in question and that he was deprived of this right. Kline has failed to meet this burden. As held by the Virginia courts in this case, Virginia law is clear that a public employee has no property or contract rights to the terms of his employment. Kline did not rely upon Ordinance No. 1974-4 to compensate him for his unused sick leave because he did not work with the expectation that he would be so compensated and it was not a factor in his decision as to when to retire. The Virginia courts have

stated in this case that payment for unused sick leave is a benefit of, not compensation for, employment and that Kline's rights to such benefit were not vested because he failed to retire during the operative period of the Ordinance conferring the benefit.

Kline and the City do not disagree on the federal law controlling this issue. The only disagreement is whether Kline's "rights" vested under state law to trigger the operation of federal law. Virginia has twice stated in this case that under Virginia law, Kline's rights did not vest. Granting Kline's Petition for a Writ of Certiorari will only serve to put this Court in the position of reviewing Virginia's law on municipal employees' retirement entitlements. This case does not present the situation where a state court has decided an important federal question, or decided a federal question in a way in conflict with the decision of another state court. Instead it presents a question of Virginia law on the vesting of public employees benefits. Virginia has answered the question, in keeping with the dictates of federal law, and a review of that decision by this Court is not warranted.

WHEREFORE, the Respondent, The City of Fairfax, Virginia, respectfully requests this Court to deny Kline's Petition for a Writ of Certiorari and to award it its costs herein incurred.

Respectfully submitted,

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